**No. SC86290**

**IN THE**
**SUPREME COURT OF MISSOURI**

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**IN THE MATTER OF THE**
**CARE AND TREATMENT OF**
**KENNETH F. SMITH,**

**Appellant.**

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**On Appeal from the Circuit Court of Jackson County, Missouri**
**16th Judicial Circuit, Probate Division**
**The Honorable John Borron, Judge**

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# RESPONDENT'S BRIEF

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## STATEMENT OF FACTS

Kenneth Smith is a pedophile (Tr. 438). He admits he sexually molested four young girls, beginning in 1987 when he was 35 years old (Tr. 424, 429-434 434-435, 440-441, 490).

His first-known victim, Tonya Stone, was the friend of Smith's live-in girlfriend (Tr. 429). He had known the girl approximately 10 weeks (Tr. 429). Smith was supposed to provide the girl, who had just celebrated her 14th birthday, a ride home (Tr. 244). He provided her a ride, but not before he had raped her (Tr. 245, 429-430).

Smith believed it was appropriate to have sex with Tonya Stone because: 1) she twice before alleged that she had been raped, and Smith believed the other men had simply been too rough with her (Tr. 432-433); and 2) he believed this was the person his girlfriend had selected for their manage a' trois (Tr. 431). The girlfriend, however, was not present when the rape occurred (Tr. 434).

Smith put the young girl on his bed, removed her clothes, and had sexual intercourse with her until she complained that she had to go to the bathroom (Tr. 245). Smith took the girl home and instructed her not to tell her mother what had occurred (Tr. 245). The young girl told her mother, but did not inform the police because she was embarrassed (Tr. 245).

Barbara Vance Gianfrancisco, now an adult, testified how Kenneth Smith assaulted her when she was only eight years old in June 1988, about one year after the Tonya Stone rape (Tr. 203-208). Smith insisted that young Barbara, a neighbor, sit on his lap while he inserted his finger into Barbara's vagina (Tr. 205). When Barbara cried and complained that Smith had hurt her, Smith took Barbara into the bathroom and began having oral sex with

her, placing his mouth on her genitals (Tr. 206).Smith molested the young girl again the next day, and explained he was trying to "masturbate her" (Tr. 485). Smith told Barbara that this was a lesson her parents had asked him to teach her, and he named three other girls in the neighborhood that he had also "taught" (Tr. 207-208). But he also warned Barbara not to tell anyone or else he would go to jail (Tr. 208). Barbara told her grandmother of the assaults, and when Smith was questioned by arresting officers, he admitted that he had a "fan club" of at least 10 little girls (Tr. 489). He pleaded guilty to sexual misconduct with Barbara Vance and was sentenced to five years in prison (Tr. 249, 435-436).

While serving 40 months of his five year prison sentence, Smith was offered Missouri Sex Offenders Program training (MOSOP), but he only completed the introductory Phase I of the program (Tr. 436-437). Smith's excuse was that the Phase II therapy group was "very, very overwhelming" (Tr. 437) and he was not required to take the training to get paroled (Tr. 437). After his release in 1991, Smith spent some time in a "men's group," but he never sought out patient sex offender treatment on his own (Tr. 494). Smith thought he had control of what was going on around him (Tr. 441).

Not long after his conditional release from prison in 1991 (Tr. 495-496), Smith molested again; this time it was two pre-school girls who were strangers to him (Tr. 193). On May 12, 1992, Connie and Jessica Charles (three and four years of age) were visiting their grandparents while the girls' parents attended a funeral (Tr. 194 - 195). Smith, who lived in the same apartment building, invited himself over to the grandparents' home, drank beer and ordered a pizza (Tr. 195). At around 10:00 p.m., after the girls had trouble going

to sleep, Smith offered to "calm them down" (Tr. 196). The girls' temporary sleeping quarters were in a closet in the grandparents' studio apartment (Tr. 196-197). The grandmother could hear, but could not understand was Smith was saying to the girls (Tr. 197). The grandmother could see only a portion of Smith's legs while he was with the girls (Tr. 197).

While the grandmother thought Smith was telling a story to the girls, in actuality was fondling their genitals and placing his tongue in their mouths (Tr. 198). He warned the girls not to tell and he fled the apartment (Tr. 298, 441). After Smith left, the girls told their grandparents that Smith was a "bad man" and they described the molestation (Tr. 198). Hysterical, the grandparents notified police (Tr. 198). Smith was arrested and eventually pleaded guilty to one count of sexual abuse in the first degree (Tr. 199, 442). He returned to prison for violating his conditional release and was placed on two years probation for this last conviction (Tr. 199, 442, 447).

In June 1993, the revolving prison door again opened for Smith, but he remained on probation (Tr. 442). While he attended a three-month behavioral training program at Renaissance West, it was not sex offender treatment (Tr. 443, 444, 494). Smith sought placement in a group home for Renaissance West graduates (Tr. 445), but it was located in Kansas and the conditions of his release required him to remain in Missouri (Tr. 445). Smith claims the Renaissance West treatment "changed" him (Tr. 516), but he thereafter drank alcohol and lied to his probation officer about imbibing (Tr. 515). He smoked marijuana and associated with a felon, causing his probation revocation in October of 1994 (Tr. 354-355).

And contrary to the directives he had been given by three separate probation officers, Smith again had contact with young children because his then-girlfriend Jan Stevens had a six year old (Tr. 508, 517-518). He also was charged with physically assaulting and dislocating the jaw of another woman named Danni Moore, a charge that Smith denies (Tr. 516).

With his probation revoked on November 23, 1994, Smith was back in prison again (Tr. 450). He was again offered MOSOP training, took Phase I, but refused Phase II, contending that he had an enemy at the Farmington prison where the training would take place (Tr. 450).

When the law changed in 1996 to deny a conditional release date to anyone not completing the MOSOP program, Mr. Smith again completed Phase I but for the third time dropped out of Phase II (Tr. 451).

In November of 1998, Smith was notified of the enactment of the Sexually Violent Predator law and given yet another opportunity to complete MOSOP in order to avoid commitment under the new law (Tr. 368-369, 452). With this new incentive, Smith started the MOSOP program in January 1999, and completed the new three-month, Phase I MOSOP program (Tr. 454). Because he was scheduled to be released from prison on September 9, 1999, however, there was insufficient time to complete Phase II of the MOSOP program (Tr. 456).

An end-of-confinement report prepared on August 25, 1999, indicated that Smith may meet the criteria of the sexually violent predator law (L.F. 8-11), and the State filed a petition to civilly commit him (L.F. 1-4). The probable cause hearing was scheduled about one week

before his release, but after he appeared in court, the hearing was continued and Smith was returned to Farmington Correctional Center (Tr. 456-457, 519). When his scheduled release date arrived, Smith was not transferred to the custody of the Missouri Department of Mental Health, as he had anticipated (Tr. 457, 520-521). Instead, left prison and he went to his father's home in Blue Springs, Missouri (Tr. 457).

Even though Smith thought he had been released as a result of a "paper SNAFU," he did not contact his attorney (Tr. 521-522). He did not want to bring any mistake to the attention of authorities (Tr. 523).

On February 10th, he informed his friend Lynda Clark and his father that he was taking a "vacation," (Tr. 575, 577), but he fled Missouri. A month later, authorities found Smith in the State of Louisiana and brought him back to Missouri (Tr. 524-525). Smith did not come willingly (Tr. 524).

Smith testified that the Phase I MOSOP program in 1999 helped him identify "thinking errors" that sex offenders use to justify their criminal activity with children (Tr. 454-455, 466). He admits he is at risk and continually has the potential for reoffending (Tr. 469). But rather than submit to treatment within the custody of the Missouri Department of Mental Health, Smith developed his own relapse prevention plan with Lynda Clark (Tr. 459-460).

Clark's knowledge of a sex offender's psychiatric needs and treatment options comes from the internet (Tr. 554, 556). She has no sex offender training (Tr. 533). But, she believes she can identify danger signals (Tr. 557).

Clark said she would insist that Smith enroll in a sex offender group if she saw Smith's deviant cycles such as secretiveness, drinking, bad clothing habits, or if "maybe we couldn't get ahold of him even though he has a beeper and a phone" (Tr. 560).

Despite this plan, Clark admitted that Smith did not tell her when he fled Missouri in February 2000 (Tr. 577-578). When she learned that authorities were looking for him, Clark tried his pager number and his phone, but he did not answer or call back (Tr. 578). Despite the relapse plan and being a part of Smith's intervention team, Clark still indicated that she "felt like [Smith] was a grown man and he could go where he wanted to go" (Tr. 577).

Smith agreed that his relapse plan has not been reviewed by a therapy group or a therapist (Tr. 530-532). He also acknowledged that he has not completed a specific sexual offender treatment program (Tr. 533-534).

Dr. Daniel Birmingham, the director of the psychology department at the Western Missouri Mental Health Center, evaluated Smith on order of the court (Tr. 213, 225). He opined that Smith is a sexually violent predator (Tr. 234). Dr. Birmingham diagnosed Smith with pedophilia based on his convictions for sexual offenses with children (Tr. 243), a recurrent pattern of sexual actions with prepubescent children (Tr. 249), and possible sexual fantasizing (Tr. 254-255).

In detailing evidence of Smith's lack of control, Dr. Birmingham noted that Smith offended against Connie and Jessica even after a prior conviction and while on parole and under supervision (Tr. 260). He offended against them in a place where he could be seen and with their grandparents present (Tr. 260). His offenses against Connie and Jessica were

unplanned, suggesting impulsivity and difficulty with control (Tr. 261). Even the offense against the Stone girl was under circumstances where he could have been discovered by others (Tr. 260).

Dr. Birmingham also reviewed Smith's probation and parole report that indicated while Smith was on probation, he had abused alcohol and drugs and was charged with slugging his girlfriend, dislocating her jaw (Tr. 269-273). Although he had been told by several probation officers to avoid contact with children, he lived with one woman who had a six year old and another woman with two teenagers (Tr. 265, 268-270). His probation was revoked for smoking marijuana and being in contact with a felon (Tr. 354-355).

According to Dr. Birmingham, pedophilia meets the definition of a mental abnormality, because the offender attempts to rationalize his behavior as meeting the child's needs (Tr. 276). Dr. Birmingham opined, without objection, and within a reasonable degree of psychological certainty, that Smith's pedophilia constitutes a mental abnormality because it affects his capacity, predisposes him to commit sexually violent offenses and he engages in this behavior knowing it is wrong (Tr. 276-277). He exhibits difficulty controlling such behavior (Tr. 277).

As to the risk of reoffending, Dr. Birmingham said that a pedophile must be aware of his offense cycle, the thoughts and behaviors that have led to the offending, and should have a relapse prevention plan with steps to avoid re-offending (Tr. 383). But, he dismissed the suggestion that Smith could successfully avoid reoffending with a relapse plan that Smith develops on his own (Tr. 397). A relapse prevention plan can not be developed in a vacuum

as an offender may be unable to identify to identify risk factors for himself (Tr. 397). A plan needs to be reviewed by persons with expertise (Tr. 397).

Dr. Birmingham opined that Smith is more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility (Tr. 278). In addition to an assessment of Smith's past behavior (Tr. 279), Dr. Birmingham related research by other experts demonstrating that for child molesters, in general, the reoffense rate is approximately 52 percent, and some authors consider that estimation conservative (Tr. 279-280, 288). Looking at Smith's individual qualities and risk factors, Dr. Birmingham concluded that Smith had a more than 50 percent risk of reoffending (Tr. 284-285).

In reaching his conclusions that Smith was more likely than not to reoffend, Dr. Birmingham compared the risk factors he identified in Smith with those that were shown to be significant in empirical literature (Tr. 289). Smith's risk factors included the wide range of the victims' ages (Tr. 290), a deviant sexual preference for children (Tr. 290-291), the number of offenses (Tr. 292), an additional history of non-sexual violence (Tr. 292), the lack of familiarity with his victims(Tr. 296-297), impulsivity (Tr. 296-297), the variety of sexual acts (Tr. 299), offences occurring while under supervision (Tr. 297), and in places where he could be caught (Tr. 298). Dr. Birmingham said that a higher incidence of offending also occurs when the offender has threatened his victims, such as when Smith had warned his young victims that they would be in trouble if they told of the molestation (Tr. 162, 298-299).

Another consideration is substance abuse that limits an individual's ability to control

(Tr. 299) and Smith had a history of alcohol abuse (Tr. 299-300). Although the risk of re-offending lessens with employment stability of least one year or more (Tr. 300), Smith had been out of prison only three months before re-offending (Tr. 300).

Dr. Birmingham also referred to actuarial instruments in assessing Smith's risk of re-offending, including the STATIC-99 and MnSOST-R (Tr. 301-302). The STATIC 99 is an instrument for predicting or assessing the risk for conviction for a sexual offense; not the risk of committing a sexual crime (Tr. 303). Smith's score of four on the STATIC-99 is associated with a 29 to 43 percent risk of conviction within the next 15 years (Tr. 303).

The MnSOST-R measures one's risk of re-arrest for a new sex offense within the next six years (Tr. 304). Smith's score of 17 predicted a 72 to 100 percent risk of re-arrest (Tr. 304). As with conviction, re-arrest rates are generally lower than the risk of re-offending "because there are offenses that take place that a person doesn't get arrested for, and even more offenses also that take place in which a persons gets arrested but not convicted." (Tr. 304-305). From these instruments, Dr. Birmingham opined that Smith is at high risk to re-offend (Tr. 305).

The last evidence of any sexual offense was in 1992 when Smith was approximately 40 years of age (Tr. 324). While there is some controversy about whether the behaviors associated with pedophilia diminish with age, Dr. Birmingham said it "can go on well into later life." (Tr. 324). If Smith had completed the MOSOP program, however, he would have developed controls to operate within society without acting on his urges, even if he continued to suffer from pedophilia (Tr. 326).

Dr. Birmingham also testified that studies published in respected journals may reach differing conclusions as to the recidivism rates for child molesters (Tr. 333-334). A study by Drs. Hanson and Bussiere found a base rate for re-offending by child molesters of 12 percent as opposed to Dr. Prentky's 52 percentage rate (Tr. 335). But, as Dr. Birmingham explained, the Hanson-Bussiere study was for 15 year period, whereas Dr. Prentky studied offenders over a period of 25 years (Tr. 334-335). Moreover, the results might differ based on the type of child molesters included in the study because incest has a lower rate of recidivism that molestations involving strangers, such as the crimes committed by Smith (Tr. 335).

Dr. Birmingham noted that Smith dropped out of Phase II of the MOSOP program on three occasions (Tr. 306-308), and that Smith did not think he needed treatment (Tr. 309). MOSOP reports indicated that Smith was not open and honest about his crimes and minimized his behaviors (Tr. 310-312).

Dr. Birmingham acknowledged research indicating that unless an individual was "kicked out" of a sexual offender treatment program, the failure to complete treatment is not a significant risk factor in calculating a re-offense rate (Tr. 367). But, there is good evidence that successful completion of such program, resulting in a plan to control behavior, can lower the re-offense risk (Tr. 359 - 360).

Dr. Birmingham said pedophiles must be aware that they should avoid children (Tr. 381-382). If Smith had told people in the community following his prison release that he needed to avoid children, it would demonstrate some awareness of his problem (Tr. 381-

382), but awareness does not mean the ability to control his behavior (Tr. 384-385).

The probate court overruled Smith's pre-trial motion to dismiss and objections to the instructions and submitted the instructions offered by the State (Tr. 410-411). At the close of evidence, instructions and arguments by counsel, the jury returned a unanimous verdict and found that Smith "should be committed to the Department of Mental Health for control, care and treatment as a sexually violent predator." (L.F. 201). The probate court entered its judgment (L.F. 228). Smith appeals.

## I.

**The evidence is sufficient and supports the verdict and judgment (Responds to appellant's point I).**

Appellant Kenneth Smith assails the judgment of the trial court, alleging that the evidence does not substantiate that he is more likely than not to re-offend (App. br. 37 - 48). While he concedes that there is no requirement in statute or constitution that the State prove a recent overt act, Smith argues that the State failed to establish a future danger (App. br. 43).

Smith contends the jury relied on speculation based on remote behavior and statistical probabilities and improperly rejected evidence that Smith had controlled his behavior subsequent to his release from prison, despite not completing MOSOP or similar training (App. br. 47).

### Review is in Light Most Favorable to Verdict

In positing his argument, Smith ignores the standard of review that evidence be viewed, as in criminal cases, in a light most favorable to the verdict. *In the Matter of the Care and Treatment of Joseph Whitnell*, 129 S.W.3d 409, 415 (Mo.App., E.D. 2004). Unfavorable evidence and inferences may be disregarded. *Hoskins v. Business Men's Assurance,* 116 S.W.3d 557, 564-565 (Mo.App., W.D. 2003); *J & J Home Builders, Inc. v. Hasty*, 989 S.W.2d 614, 617 (Mo.App., E.D. 1999). As the statement of facts demonstrates, there was more than sufficient evidence in the record from which reasonable jurors could conclude that Smith was a sexually violent predator who required commitment.

**Evidence Demonstrates: Smith Is More Likely Than Not to Re-Offend**

Kenneth Smith admits that he is a pedophile (Tr. 438). He does not dispute that he has committed sexually violent offenses, having sexually molested at least four young girls, beginning in 1987, and was convicted of sexually violent offenses (Tr. 428-435, 440-441, 490). According to Dr. Daniel Birmingham, a psychologist and the only expert to testify at trial, pedophilia meets the definition of a mental abnormality because the offender attempts to rationalize his behavior as meeting the child's needs (Tr. 276). The only issue Smith raises with respect to the sufficiency of the evidence is whether he is more likely than not to re-offend.

Dr. Birmingham stated within a reasonable degree of psychological certainty that the pedophilia Smith has manifested constitutes a mental abnormality in that it affects his capacity, it predisposes him to commit sexually violent offenses, and he has serious difficulty controlling that behavior (Tr. 277). Smith does not challenge the admissibility of this testimony. Nor is there any contention that evidence used by Dr. Birmingham in reaching his conclusion was unreliable. Smith limits his contention to a balancing of the evidence, arguing that Dr. Birmingham's reliance on base reoffense rates for child molesters, and the risk percentages derived from the actuarial instruments, are insufficient to establish that he is more likely than not to reoffend (App. br. 45). Dr. Birmingham's testimony is much more than that, and the whole record established Smith's high likelihood to reoffend.

In *Whitnell v. State* 129 S.W.3d 409, 416 (Mo.App., E.D. 2004), testimony of a psychiatrist was found sufficient to support a jury verdict that the defendant was a sexually

violent predator, even though the psychiatrist admitted that he was not "certain" that the defendant would definitely reoffend. The court stated that "[t]he law does not require absolute certainty of an opinion about future behavior." 129 S.W.3d at 416. Missouri requires only that an expert's opinion be reasonably certain. *Id*; *Turnbo by Capra v. City of St. Charles*, 932 S.W.2d 851, 855 (Mo.App., E.D. 1996). Dr. Birmingham gave his opinion within a reasonable degree of psychological certainty (Tr. 277). It is within the jury's domain to make a credibility determination as to the State's expert. *In re Care and Treatment of Collins*, 140 S.W.3d 121, 126 (Mo.App., E.D. 2004).

Testimony regarding risk prediction of sexually deviant behavior based on results of actuarial instruction has been held admissible in Missouri. *In the Matter of the Care and Treatment of Goddard*, No. 25799 (Mo.App., S.D. Aug. 10, 2004) (Slip. op. 7)[1]. Smith cites *State v. Huss*, 666 N.W.2d 152 (Iowa 2003), and *In the Matter of George L.*, 648 N.E.2d 475 (N.Y. App. 1995), as supporting his proposition that evidence of the nature of prior acts and statistical evidence of relapse are insufficient to establish the future danger necessary for civil commitment (App. br. 45). Even if held to be the law in Missouri, the State in this case presented much more evidence than the mere nature of prior acts and statistical evidence of relapse.

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[1] This opinion is not yet final and has been attached for the convenience of the Court. An Application for Transfer, filed with the Missouri Supreme Court (SC86295) on September 13, 2004, is still pending as of the date of this brief.

In addition to the nature of Kenneth Smith's crimes and statistical analysis of relapse, Dr. Birmingham reached his expert opinion that Smith was likely to reoffend based on a review of Smith's behavior after each of his recurrent acts of molestation, as well as Smith's continual failure to complete sexual offender training and the lack of a legitimate relapse prevention plan. Dr. Birmingham said that from everything he had read, Kenneth Smith did not really see the need for treatment (Tr. 309). The State presented evidence that Smith had engaged in risky behavior during periods of non-confinement, including drug and alcohol abuse (Tr. 504, 511). Smith's self-styled relapse prevention had not been reviewed by experts (Tr. 530-531). Moreover, evidence that Smith bolted from Missouri in February 2001, after learning that authorities were looking for him (Tr. 524), must have crystalized for the jury that Smith's self-styled relapse prevention plan was not going to work. Members of Smith's alleged intervention team were unable to reach him by phone or pager after he left for Louisiana (Tr. 575-577). And despite his team member's desire to have Smith attend sex offender training, he did not attend (Tr. 581).

This is precisely the type of evidence that the court said in *In the Matter of George L.*, the State should present to prove that an individual was a physical danger to himself or others. "The prosecution may meet its burden of proving that a defendant poses a current threat to himself or others warranting confinement in a secure environment, for example, by presenting proof of *a history of prior relapses into violent behavior, substance abuse or dangerous activities upon release*[.]" 648 N.E.2d 475, 481 (emphasis added). The State of Missouri demonstrated that Kenneth Smith has a history of relapse into violent behavior,

substance abuse, or other dangerous activities upon release from prison.

Smith's cite to *State v. Huss*, 666 NW 2d 152 (Iowa 2003), also does not aid him as Huss is so factually distinguishable that it provides little relevant instruction. The Iowa court in *Huss* stated that it required evidence of a "recent overt act, attempt or act" to justify continued commitment, an element that Smith admits should not be included in Missouri's § 632.495 (App. br. 43). Moreover, defendant Huss had been a model prisoner for 17 years. 666 N.W.2d at 161. Kenneth Smith fails to demonstrate anything close to a 17 year history of model behavior.

Smith next suggests that his actual behavior in the "most recent" past, even without treatment, is the most important factor in determining whether he can control his behavior (App. br. 47). As discussed by Dr. Birmingham, however, studies that followed sex offenders for longer periods of time – 25 years versus 15 years – revealed a higher rate of recidivism (Tr. 334-335). This suggests that Smith's behavior during a period of less than two years is hardly an accurate gauge of future behavior.

Smith also can not pick and choose what "most recent" past behavior the jury should consider. While there may be not evidence of deviant sexual behavior after 1992, the record is replete with other instances where he failed to control his behavior. He was around children (Tr. 508, 516-518) and he abused drugs and alcohol (Tr. 395 - 396), the latter being factors that contributed to Smith's probation revocation in 1994 (Tr. 354-355; 515). As Dr. Birmingham testified, such failure to control those behaviors places Smith in a position to reoffend (Tr. 396).

Further, Lynda Clark said that if she saw Smith's deviant cycles, for example if she "couldn't get ahold of him even though he has a beeper and a phone," she would insist that he enroll in a group setting (Tr. 560). Smith, however, ran away and he did not tell Lynda Clark when he fled Missouri in February 2000 (Tr. 577-578). He did not answer his beeper or phone, and Clark admitted that Smith never enrolled in a sex offender program on her watch (Tr. 580). If the jury is to focus on Smith's most recent behavior, it must consider Smith's failure to enroll in supervised treatment that would, at least, lower Smith risk of reoffending (Tr. 580).

The State's evidence demonstrated beyond a reasonable doubt that Kenneth Smith was a sexually violent predator who was more likely than not to offend, and the judgment should be affirmed.

## II.

**The statutory instruction was a correct statement of the law, was not prejudicial, and the statute requiring the instruction is constitutional. (Responds to appellant's arguments Points II and III).**

In Point II, Smith argues that the court erred in denying his motion to dismiss the commitment petition because § 632.492, RSMo (Cum. Supp. 2003), improperly required the court to instruct jurors that he would be "committed to the custody of the director of the department of mental health for control, care and treatment." (App. Br. 49). He argues that this statutory requirement violates his constitutional rights to a fair trial and fair jury by 1) injecting irrelevant matters into the case, 2) not following the substantive law in failing to advise the jury of the full consequences of their verdict, and 3) minimizes the jury's sense of responsibility. In Point III, Smith similarly attacks the jury instruction itself (Instruction No. 6), rather than the statutory provision that requires it. Contrary to Smith's contentions, the instruction follows the substantive law and the statute is constitutional.

### Standard of Review

Instructional errors result in reversal only when there are "defects of substance with substantial potential for prejudicial effect." *Smith v. Kovac,* 927 S.W.2d 493, 499 (Mo.App., E.D. 1996). An instruction is not substantially defective if it "follows the substantive law and can be readily understood by the jury." *Reis v. Peabody Coal Co.*, 997 S.W.2d 49, 71 (Mo.App., E.D. 1999). Jurors are credited with "ordinary intelligence, common sense, and an average understanding of the English language." *Smith v. Kovac,* 927 S.W.2d at 498.

Absent extraordinary circumstances, appellate courts assume the jury has obeyed the trial court's instructions and directions. 927 S.W.2d at 498. The party claiming instructional error has the task of showing that the instruction "misdirected, misled, or confused the jury." *Gorman v. Walmart Stores, Inc.*, 19 S.W.3d 725, 730 (Mo.App., W.D. 2000). Prejudice is considered only if the instruction is erroneous. *See In re Coffman*, 92 S.W.3d 245, 249 (Mo.App., E.D. 2002) (regarding sexually violent predator verdict directors).

**Care and Treatment Are Relevant**

Smith argues that it is irrelevant to a jury's determination whether sexually violent predators are provided treatment (App. br. 52-53). Citing *State v. Butler*, 731 S.W.2d 265, 272 (Mo.App., W.D. 1987), and *State v. Rogers*, 753 S.W.2d 607, 611 (Mo.App., E.D. 1988), Smith further argues that the impact of Instruction No. 6 is similar to the State's justification for using peremptory strikes against nurses, asserting that nurses may demonstrate compassion or sympathy for the defendant. Smith proffers that in sexually violent predator cases, with the help of the General Assembly, "the State can tap into the compassion and sympathy to gain the respondent's 'treatment' without the burden of focusing on 'secure confinement.'" (App. br. 60-61).

First, Instruction No. 6, which was required by § 632.492 RSMo, was not the verdict director. The verdict director setting forth the elements necessary for finding Smith a sexually violent predator was Instruction No. 5 (L.F. 189). The verdict director, Instruction No. 5, says nothing about care and treatment. Thus, it can not be said that the State preyed on the jury's sympathy in determining whether Smith was a sexually violent predator.

Second, Instruction No. 6 merely explained to the jury that *if* the jury finds Smith to be a sexually violent predator, he will be civilly committed, rather than criminally imprisoned. The jury learned from that instruction that confinement will be civil, rather than criminal, because commitment will be in the custody of the director of the department of mental health for control, care and treatment – all objectives of the civil law. *Seling v. Young*, 531 U.S. 250, 260-263 (2001); *Kansas v. Hendricks*, 521 U.S. 346, 361-369 (1997).

As an objective of civil law, Smith's civil commitment for control, care and treatment, as related in Instruction No. 6, is a relevant fact. The very style of this case – "In the Matter of the Care and Treatment of Kenneth Smith"– demonstrates that Instruction No. 6 imparts relevant information to the jury.

As commented by the trial court during the instruction conference in this case, "all through voir dire the jury wanted to know what was going to happen to him if he gets committed, and talk about confusion – " (Tr. 409-410). Instruction No. 6 not only imparts relevant information, but clarifies an issue for the jury.

**Instruction No. 6 Tracks the Substantive Law**

Smith's attack on jury Instruction No. 6, and the statute requiring it, is reminiscent of the arguments made in *In the Matter of the Care and Treatment of Scates v. State,* 134 S.W.3d 738 (Mo.App., S.D. 2004), and more recently in *Boone v. State*, No. ED 82669-01 ((Mo.App., E.D. 2004), and *In the Matter of the Care and Treatment of Lewis v. State*, WD62339 (Mo. App., W.D. Oct. 5, 2004). Although the latter two cases were not yet final as of the date of the filing of the State's responsive brief, the cases are instructive. And,

together with *Scates,* demonstrate a consistency among the judges of all the three Districts of the Missouri Court of Appeal.

In neither *Scates, Boone,* nor *Lewis,* did the appellate court find an instruction relating to the "control, care and treatment" of the respondent to be an inaccurate statement of law. The Courts of Appeal have consistently held that an instruction, identical to Instruction No. 6, was not erroneous.

As the Western District recognized in *Lewis,* when there exists no applicable Missouri Approved Instruction (MAI), the court is required to give an instruction that is "simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts." *Lewis,* slip op. 4, citing Mo.R.Civ.P. 70.02(b). No error occurs when the instruction follows the substantive law. *Scates,* 134 S.W.3d at 741-42; *Lewis,* slip op. at 4. Instruction No. 6 stated simply, "If you find Respondent to be a sexually violent predator, the Respondent shall be committed to the custody of the director of department of mental health for control, care and treatment." (L.F. 190). Section 632.492, RSMo (Cum. Supp. 2003), requires:

> If the trial is held before a jury, the judge shall instruct the jury that if it finds that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment.

As in *Scates, Boone,* and *Lewis,* Instruction No. 6 tracked the statutory language of § 632.492 exactly. It informed the jury that persons adjudicated as sexually violent predators are,

indeed, "committed to the custody of the director of the mental health for control, care and treatment." § 632.495.

If the jury was left with the impression that Smith was to be criminally imprisoned, then it might be said that the jury was misled. Instruction No. 6, as required by the §632.492 RSMo, precludes any misunderstanding as to Smith's fate. The instruction is not erroneous as it clearly follows the substantive law and does not mislead the jury.

Smith argues that even if the above instruction parroted statutory language, it fails to follow substantive law because it does not inform the jury that he remains confined until such time as his mental abnormality has so changed that he is safe to be at large (App.'s br. 64-65). The incongruity of this argument is self evident. Smith first contends Instruction No. 6 imparts irrelevant information regarding his treatment. But since he can not ignore that the instruction precisely follows the statute, he is reduced to arguing that if only the jury was given *more* information, the instruction then follows the substantive law and thus, becomes pertinent.

This is similar to the contention raised in *Scates*, where the respondent argued that the instruction required by § 632.492, was "okay as far as it goes" and offered an identical instruction, only with the additional detail that Smith contends is necessary for the instruction to follow the substantive law. The *Scates* court called such argument "disingenuous." 134 S.W.3d at 742.

Moreover, how long Smith remains in the custody of the director of the Department of Mental Health, and the standard for his future release, are not necessary or relevant to the

issue that *this* jury was to decide. The additional information Smith tenders relates to future proceedings, dependent on future events. How long he will remain in custody for his care and treatment is an unknown. That Smith will be remanded to the custody of the director of the Department of Mental Health is a known, immediate consequence of the jury's finding that Smith is a sexually violent predator and is relevant to *this* jury's finding.

**Jury's Responsibility Not Minimized**

All three districts of the Missouri Court of Appeals have held that instructions identical to Instruction No. 6 do not minimize the jury's responsibility in finding whether the respondent was a sexually violent predator. *Scates*, 134 S.W.3d at 741-742; *Boone*, Slip Op. 5; *Lewis,* Slip Op. 4. The courts' rationale, as expressed in *Boone v. State,* is that the instruction in issue was not the verdict director in which the jury was charged with determining whether Smith was a sexually violent predator. Thus, it "did not have a substantial potential for prejudicial effect. An average jury would understand that a finding that Boone was a SVP would subject him to the 'control, care and treatment' of the department of mental health." (Slip. op. 5). The appellate court concluded that the instruction "did not improperly minimize the jury's responsibility in finding whether Boone was a SVP." *Id.*

The same ruling is appropriate here. When considered with the verdict director, nothing in Instruction No. 6 leads the jury to think that it had a say in Smith's treatment or lessened their sense of responsibility to determine whether the Smith is a sexually violent predator. The instruction merely informed the jury that appellant will be civilly committed,

rather than criminally imprisoned, if he is found to be a sexual predator.

Smith's citations to *In re Lair*, 11 P.3d 517 (Kan. App. 2000), and *People v. Rains*, 89 Ca.Rptr.2d 737 (Cal. App. 5th Dist. 1999), are unavailing. The Kansas case involved the proper exclusion of evidence of the *course* of treatment an alleged sexual predator wished to receive if he were not committed, in particular the recidivism rates of sexual offenders who had completed a private treatment program. *See Lair*, 11 P.3d at 519-520. Of course the appellant in the instant case completed no sexual offender treatment program, private or otherwise.

The California case involved the non-prejudical, but improper admission of the type of treatment an alleged sexual predator would receive if committed. *Rains*, 89 Cal.Rptr.2d at 740. The California case actually demonstrates the wisdom of informing the jury that a sexual predator's confinement is civil in nature. In that case, improper testimony was presented as a result of a juror's expressed concern that the alleged predator would be sent to prison, though he was not charged with a crime. In Missouri, all such concerns can be answered with reference to the language of the legislatively required instruction.

**Closing Argument May Properly Mention Treatment**

Smith tries to bolster his contention of prejudice from Instruction No. 6 by referencing those portions of the State's closing argument (most to which there was no objection), wherein the State mentions treatment and Dr. Birmingham's opinion of Kenneth Smith's supposed relapse prevention plan (App. br. 58, *citing* Tr. 595, 597, 598, 616). These contentions do not change the analysis. The State's arguments were proper because they did

not misstate the law or mislead the jury.

Contrary to Smith's contention, an instruction or argument regarding treatment is a relevant factor and not merely a tactic that the State uses to persuade the jury to commit a sexually violent predator. "The goals of civil commitment are incapacitation *and treatment*, while the primary goal of criminal punishment are retribution and general deterrence." *In re Care and Treatment of Norton,* 123 S.W.3d 170, 177 (Mo. banc 2003) (emphasis added). *See also Westerheide v. State,* 831 So.2d 93, 112 (Fla. 2002) (control and treatment: The ...Act serves the dual state interests of providing mental health treatment to sexually violent predators and protecting the public from these individuals"). Any closing argument or an instruction directed toward one or all of these objectives is related to a legitimate State interest and is, therefore, proper. A correct statement of law in an instruction or argument about a legitimate state interest does not unconstitutionally minimize the jury's sense of responsibility about its role. *See California v. Ramos,* 463 U.S. 991, 1009 (1983) (informing jury of governor's power to commute sentence of life without parole was "an accurate statement of potential sentencing alternative"), explained in *Caldwell v. Mississippi,* 472 U.S. 320, 335 (1985) (O'Connor, J., concurring).

The analogy that Smith tries to draw among *Caldwell v. Mississippi,* 427 U.S. at 328-329, *State v. Roberts,* 709 S.W.2d 857, 869 (Mo. banc 1986), *State v. Stutts,* 723 S.W.2d 594, 595-596 (Mo.App., W.D. 1987), and this case is unavailing. In *Caldwell,* in a plurality opinion, the United States Supreme Court admonished the use of arguments that *mislead* a jury about its role in criminal sentencing in a way that lessens its sense of responsibility for

the sentencing. *See Darden v. Wainwright*, 477 U.S. 168, 183 n. 15 (1986). *Caldwell* involved a jury argument on capital sentencing that was both inaccurate and not relevant to any legitimate state interest, and that misled the jury into thinking that the appellate court actually determined whether the defendant would die. *Caldwell*, 472 U.S. at 336 (O'Connor, J., concurring). No such inaccurate information was communicated in the instant case, and as Smith recognizes, *Caldwell* does not prohibit correct statements of the law. *State v. Richardson*, 923 S.W.2d 301, 321 (Mo. banc 1996).

Likewise, *State v. Roberts* does not aid Smith. There, the Missouri Supreme Court held *Caldwell* distinguishable, found no manifest injustice occurred as a result of the prosecutor's closing argument, noting that no objection was voiced, and upheld the capital sentence. 709 S.W.2d at 869.

*Stutts*, likewise, is not persuasive as the facts clearly are distinguishable. Over objection, the prosecutor argued that the jury's sentence was only a recommendation to the court. The court not only overruled the objection, but then repeated the prosecutor's argument within the jury's hearing. This clearly lessened the jury's sense of responsibility. In this case, much of the State's closing argument regarding treatment was not objected to. But more importantly, nothing in Instruction No. 6, or the statute requiring it, coerced the jury into believing that the jury's decision was only a recommendation and that the court would really be the one to find Smith a sexually violent predator.

**The Court Correctly Followed the Law**

Smith invites the court to ignore the statutory directive in § 632.492 RSMo, absent the

addition of the language in § 632.495, that the commitment lasts "*until such time as the person's mental abnormality has so changed that he is safe to be at large*." Smith cites *State v. Carson*, 941 S.W.2d 518 (Mo. banc 1997), wherein the Supreme Court held that "MAI-CR and its Notes on Use are 'not binding' to the extent they conflict with substantive law." 941 S.W.2d at 520.

The instant case does not involve an Missouri Approved Instruction and the statutory directive in § 632.492 *is* the substantive law. That the instruction does not go as far as Smith would like does not mean that the instruction is incorrect or misleading.

Smith recognizes that the Missouri Court of Appeals, Southern District, rejected his argument in *In the Matter of the Care and Treatment of Scates*, wherein the court stated, "[t]here can be no dispute that, in parroting the precise language of Section 632.493, [the instruction] 'follow[ed] the substantive law." 134 S.W.3d at 742. Unable to distinguish *Scates*, Smith merely contends that the appellate court was wrong and there are "critical" distinctions between *Scates* and the instant case because the issue was not well raised in *Scates*.

Section 632.492 is the law. The General Assembly did not direct that additional language from § 632.495 be included. Smith has not shown that the lack of additional information in Instruction No. 6 is unconstitutional and has failed to demonstrate prejudice. *See Boone*, slip. op. 5 (finding "no substantial potential for prejudicial effect" from the statutory instruction).

## III.

**The verdict form was proper. (Responding to Appellant's Point IV)**

Smith complains that the verdict form did not allow for a jury finding that Smith was a sexually violent predator, but found that he should be committed to the Department of Mental Health for control, care and commitment. Smith alleges that this was not a question presented to the jury by any of the statutory or case law applicable to sexually violent predators (App. br. 68).

The State tendered and the trial court submitted to the jury, the following form:

> Note: Complete this form by filling in the word or words required by your verdict.
>
> We, the jury, find that respondent Kenneth F. Smith _____ )
>
> here insert either "should" or "should not" be committed to the Department of Mental Health for control, care, and treatment as a sexually violent predator.

(L.F. 201).

At the instruction conference, Smith's attorney made no argument regarding the propriety of this verdict form (Tr. 401- 412), but only tendered his own verdict form "J" for the trial court's consideration (Tr. 410-411), which the court refused (Tr. 411).[2] At the close

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[2] Smith's verdict form "J" is in the supplemental legal file and is included in the appendix to his primary brief at A-5.

of the evidence, and after the trial read the instructions to the jury, Smith's attorney realized he failed to object to the verdict form and made this statement:

> Mr. Zwink: Judge, I'm sorry but I believe I failed to object to the verdict form, even though I submitted my own, and at this time I would object to the verdict form because I believe it is having the jury make a finding not required by the statute; in fact, it's not having the jury make a finding that is required by statute, so that's my objection, Your Honor. And to submit it would be violating Mr. Smith's right to due process and equal protection under the United States and Missouri constitution. We had that the last time and I think that's the one that got submitted.

(Tr. 584).

This colloquy demonstrates only that Smith claimed at trial that the verdict director included what Smith believed was an unnecessary element and failed to include what he believed was a necessary element, the specifics of which were not presented. Smith did not renew his objection or provide the trial court with any more specifics when the jury returned its verdict (Tr. 624-627). In his motion for new trial, however, Smith suggested for the first time that the verdict director "requires a finding not in the statute and...fails to require the jury to actually find respondent is a sexually violent predator." (L.F. 218). On appeal, Smith repeats his the claims he made in his motion for new trial (App. br. 66). But this is

insufficient to preserve the issue for anything other than plain error review.

"To be timely raised, an objection must be raised either at the instruction conference, or when the verdict is returned by the jury, before it is accepted by the court." *Adams v. Children's Mercy Hosp.*, 848 S.W.2d 535, 541 (Mo.App. W.D.1993). "[A]n objection to a verdict form may not be raised for the first time in a motion for new trial." *Id.* While Smith told the trial judge *after the instructions were read* that the verdict form was missing *something*, he did not delineate what was missing until his motion for new trial. For the first time, then, he articulated the argument that the verdict form failed to require the jury to find that he is a sexually-violent predator. Thus, Smith waived that objection and the review by this Court should be only for plain error. Rule 84.13(c). "Verdict forms are not entitled to the same presumption as instructions in connection with preservation of error for appeal." *Vancil v. Carpenter*, 935 S.W.2d 42, 48 (Mo.App., W.D. 1996).

Assuming that a verdict form is akin to an instruction for purposes of plain error review, "[i]nstructional error constitutes plain error when it is clear the trial court so misdirected or failed to instruct the jury so that it is apparent the error affected the verdict." *State v. Beeler*, 12 S.W.3d 294, 300 (Mo. banc 2000). The Missouri Court of Appeals, Western District, recently rejected under plain error review the same contention Smith raises in this case regarding the verdict form. *In the Matter of the Care and Treatment of Lewis v. State*, Slip. op. 2. As the appellate court recognized, the verdict form did not merely say that the respondent should be committed to the Department of Mental Health. "It also said that he should be committed 'as a sexually violent predator.'" *Lewis*, Slip. op. 3.

Even if this Court would find that the hurried objection at trial was sufficient to preserve the objection that Smith now raises on appeal, under any standard Smith's claim cannot succeed. Smith has not raised on appeal any contention of error with respect to the verdict director, Instruction No. 5 (L.F. 189). "It is well established law that the verdict directing instruction and the verdict form are to be read together." *Lindsey Masonry Co., Inc. v. Jenkins & Associates, Inc.*, 897 S.W.2d 6, 12 (Mo.App., W.D. 1995). The verdict director read in applicable part:

> If you find and believe from the evidence beyond a reasonable doubt: First, that the respondent pleaded guilty to sexual abuse first degree in the Circuit Court of Jackson County, State of Missouri, on December 15, 1992, and Second, that the offense for which the respondent was convicted was a sexually violent offense, and Third, that the respondent suffers from a mental abnormality, and Fourth, that this mental abnormality makes the respondent more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility, then you will find that the respondent is a sexually violent predator.

(L.F. 189).

Smith admits that this instruction set out the necessary elements the jurors have to find in order to commit a person to the Department of Mental Health as a sexually violent predator (App. br. 75-76). He does not contend that the verdict form was separated from the

packet of instructions given the jury, that included the verdict director. The jury was correctly instructed that it had to find beyond a reasonable doubt that Smith is a sexually violent predator. Only *if* the jury finds a respondent to be a sexually violent predator, shall the jury commit Smith to the custody of the Department of Mental Health for treatment. Smith contends that all "we can be sure of is that the jurors unanimously agreed that Mr. Smith 'should' be placed in DMH for sex offender treatment." (App.'s br. 70). But that is not true. Smith conveniently omits the precise question posed by the verdict form: whether or not Smith should be committed "*as a sexually violent predator*." (L.F. 201) (emphasis added). By finding that Smith "should be committed to the Department of Mental Health for control, care, and treatment as a sexually violent predator" (L.F. 201) after having received the definition of a "sexually violent predator" (Instruction 5, L.F. 189), the jury could not have been plainer.

Smith next argues that the verdict form fails to meet the constitutional standard set forth in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) (App. br. 70-71). But, *Apprendi* this case does not aid Smith because it relates the rights of criminal defendants and holds that where a defendant might be exposed to an enhanced penalty, the defendant is entitled to a jury determination as to the facts that would increase the defendant's exposure. "Capital defendants...are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 530 U.S. at 589. Of course, Smith is not being exposed to any punishment and, to the extent that the jury found he should be committed for custody, care and treatment, it is manifest that they did so because they found

him to be a sexually violent predator. (L.F. 189, verdict director - Instruction No. 5).

*State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), is equally unavailing. Smith contends the case stands for the proposition "that a ' presumption' that the jurors found the necessary elements contained in a verdict director is inadequate to overcome the high, constitutional necessity of proof beyond a reasonable doubt." (App. br. 72-73). But *Whitfield* involved "presumptions" in the context of a jury's penalty phase deliberations. The jury had stated they were deadlocked on the penalty and the judge then imposed the ultimate sentence. The question was whether the jury deliberated in accordance with the multiple step statutory process for imposing the death penalty. 107 S.W.2d at 263. Obviously, Smith's case is not a death penalty case – it is not even a criminal case – and the verdict form here had none of the problems attendant to the death penalty sentencing procedure.

Smith's citation to *Wynn v. State*, 1 Blckf. 1147 (Ind. 1818), provides for interesting, historical reading, but it hardly is relevant. The jury returned a verdict imposing various fines on some, but not all of the defendants who had been indicted for rioting. 1 Blackf. 1147 (Ind. 1818). The jury returned a verdict: "We the jury fine" eight named defendants "at ten dollars each," and four other defendants, "at one dollar each," and was silent regarding the other two defendants. *Id*. The Indiana Supreme Court found the verdict insufficient to authorize the judgment because the jury had not found any of the defendants guilty. First, there was no discussion regarding verdict directors or verdict forms that might have clarified the verdict in *Wynn*. Second, the jury in this case unanimously found that Smith should be committed "as a sexually violent predator" (L.F. 201). Nothing in the *Wynn*

verdict indicated whether the jury imposed the fines on the individuals "as rioters." Contrary to Smith's allegations, there was not a "total neglect" as to whether Smith was a sexually violent predator.

Smith next points to verdict directors and forms used in traditional civil commitments and argues that the court was wrong to accept a sexually violent predator verdict form that is akin to the verdict forms used for traditional civil commitment (App. br. 76-77). Smith argues that the question posed to jurors in civil commitment cases is whether the person should be detained for treatment whereas in this case, the jurors are to determine whether the person is a sexually violent predator.

Smith's argument in this regard actually reinforces the State's position. Section 632.350.3, RSMo 2000, governing traditional civil commitments, provides that in jury cases, "the jury shall determine and shall be instructed only upon the issues of whether or not the respondent is mentally ill and, as a result, presents a likelihood of serious harm to himself or others." As Smith notes, however, the traditional civil commitment verdict form requires that jurors determine if the person should be detained for treatment, though this is not mentioned in the statute. (App. br. 76, *citing* MAI 36.18).

In contrast, in the sexually violent predator context, the General Assembly has specifically decreed that the jury should be instructed that the predator will be treated. The submitted verdict form is consistent with that edict.

Smith relies on *People v. Rains,* 75 Cal.App. 4th 1165 (Cal. App., 1999), and *In the Matter of the Care and Treatment of Lair,* 11 P.3d 517, 519 (Kan. App.., 2000), as "holdings

of other courts that have considered this issue" (App. br. 77). But the Kansas and California courts did not pass on the adequacy of jury instructions unique to Missouri. And, as discussed in Point II of this respondent's brief, these decisions are purely evidentiary in nature. *Lair* involved the proper exclusion of evidence of the course of treatment an alleged sexual predator wished to receive if he were not committed. *See Lair*, 11 P.3d at 519-520. In this context, the language from *Lair* that Smith parses about the jury not deciding a course of treatment (App. br. 77-78) makes sense. Nothing in the submitted verdict form said anything about the particular course of treatment, much less left such considerations in the juror's hands.

*Rains*, likewise, provides little guidance. That case involved the admission of the type of treatment an alleged sexual predator would receive if committed. *Rains*, 89 Cal.Rptr.2d at 740. Again, the submitted verdict form said nothing about the *type* of treatment – only that treatment was the ultimate result.

As a final matter, Smith contends he must be discharged or his commitment reversed and the cause remanded. But the State proved every element necessary for Smith's commitment to the Department of Mental Health as a sexually violent predator. Even if Smith were correct with respect to the instructions and the verdict form, which he is not, the only appropriate remedy would be remand. *In the Matter of the Care and Treatment of Thomas*, 74 S.W.3d 789, 792 (Mo. banc 2002).

## CONCLUSION

Based on the foregoing, respondent State of Missouri respectfully submits that the judgment of the trial court should be affirmed.

Respectfully Submitted,

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## Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 25th day of October, 2004, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Emmett D. Queener
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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 10,026 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____
Assistant Attorney General

# APPENDIX

## TABLE OF CONTENTS TO APPENDIX